82-423

Office - Supreme Court, U.S.
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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

GARY KOO and
ANTHONY SALVATORE JACENE,
Petitioners,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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September, 1982

QUESTION PRESENTED

Is a statute which prohibits as commercial gambling merely "receiving a bet" so overbroad in its scope and vague in its application as to be unconstitutional under the Fifth Amendment and Fourteenth Amendment of the United States Constitution?

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THE STATE OF OKLAHOMA,
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PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

The petitioners, Gary Koo and Anthony Salvatore Jacene, pray that a Writ of Certiorari issue to review the Opinion of the Oklahoma Court of Criminal Appeals.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is set out in Appendix A and is reported as *State* v. *Koo*, 647 P.2d 889 (Okl.Cr. 1982).

The District Court Order Affirming Magistrate as to Petitioner Koo, entered on August 19, 1980, is set out in Appendix C.

The District Court Order Affirming Magistrate as to Petitioner Jacene, entered on August 19, 1980, is set out in Appendix D.

The Order of the Magistrate sustaining the Demurrer of Petitioner Koo, entered on July 28, 1980, is set out in Appendix E.

The Order of the Magistrate sustaining the Demurrer of Petitioner Jacene, entered on July 28, 1980, is set out in Appendix F.

JURISDICTION

The Opinion sought to be reviewed was entered by the Oklahoma Court of Criminal Appeals on June 16, 1982.

Petitioners' timely Petition for Rehearing was denied by Order of the Oklahoma Court of Criminal Appeals, entered July 12, 1982, and this Order is set out as Appendix B.

The jurisdiction of this Court is invoked under Tit. 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Tit. 21 O.S. §981, states in pertinent part:

> "*Definitions* As used in this act:
>
> 1. A 'bet' is a bargain in which the parties agree that, dependent upon chance, or in which one of the parties to the transaction has valid reason to believe that it is dependent upon chance, one stands to win or lose something of value specified in the agreement. A bet does not include:
>
> a. bona fide business transactions which are valid under the law of contracts including, but not limited to, contracts for the purchase or sale at a future date of securities or other commodities and agreements to compensation for loss caused by the happening of the chance including, but not limited to contracts of indemnity or guaranty and life or health and accident insurance; or
>
> b. any bingo game or a game of chance with comparable characteristics by or for participants conducted by an authorized nonprofit organization under the laws of this state pursuant to Title 21, Oklahoma Statutes, Sections 995.1 to 995.18; or
>
> c. offers of purses, prizes or premiums to the actual participants in public and semipublic events, as

follows, to wit: Rodeos, animal shows, expositions, fairs, athletic events, tournaments and other shows and contests where the participants qualify for a monetary prize or other recognition. The subparagraph further excepts an entry fee from the definition of a 'bet' as applied to enumerated public and semipublic events.

* * *

4. A 'gambling place' is any place, room, building, vehicle, tent or location which is used for any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries; or playing gambling devices. Evidence that the place has a general reputation as a gambling place or that, at or about the time in question, it was frequently visited by persons known to be commercial gamblers or known as frequenters of gambling places is admissible on the issue of whether it is a gambling place."

Tit. 21 O.S. §962 states:

"*Commercial gambling*

A. Commercial gambling is:

1. Operating or receiving all or part of the earnings of a gambling place;

2. Receiving, recording or forwarding bets or offers to bet or, with intent to receive, record or forward bets or offers to bet, possessing facilities to do so;

3. For gain, becoming a custodian of anything of value bet or offered to be bet;

4. Conducting a lottery or with intent to conduct a lottery possessing facilities to do so;

5. Setting up for use or collecting the proceeds of any gambling device; or

6. Alone or with others, owning, controlling, managing or financing a gambling business.

B. Any person found guilty of commercial gambling shall be punished by imprisonment for not more than ten (10) years or a fine of not more than Twenty-five Thousand Dollars ($25,000.00), or by both such fine and imprisonment."

Tit. 18 U.S.C. §1955, states in pertinent part:

"*Prohibition of illegal gambling businesses*

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

STATEMENT OF THE CASE

The two Petitioners were charged by information, *State of Oklahoma* v. *Gary Koo*, CRF 80-322, CRF 80-325, CRF 80-326 and CRF 80-333, and *State of Oklahoma* v. *Anthony Salvatore Jacene*, CRF 80-300 and CRF 80-319, in the District Court of Cleveland County, State of Oklahoma. Each virtually identical information charged the crime of Commercial Gambling. The charging portions of each information, which are set out in the Oklahoma Court of Criminal Appeals opinion in Appendix A, alleged the receiving by a Petitioner of a single bet.

In each case Petitioners sought dismissal of the information. The Preliminary Hearing Magistrate, a Special District Judge, held in each case that the Petitioners were charged with Commercial Gambling under Tit. 21 O.S. §982(A-2), that is, each information charged the Petitioners with "receiving bets." The Magistrate held, *inter alia*, that §962(A-2) which made merely "receiving bets" Commercial Gambling was so overly broad and vague in it's terms that reasonable men could not be expected to know what, if any, activity was prohibited, a violation of due process under the Constitutions of the United States and the State of Oklahoma. The Magistrate's identical written orders are set out in Appendix E and Appendix F.

The Magistrate sustained the Demurrers in each of Petitioner's cases and held further proceedings in abeyance, pursuant to Oklahoma procedural rules, so that the Respondent could appeal the Orders to a full district judge. A timely appeal was taken to the district court judge and after a hearing the court issued Orders Affirming the Mag-

istrate. The district court's identical written orders are set out in Appendix C and Appendix D.

A timely appeal was pursued by the Respondent to the Court of Criminal Appeals, the highest Court for criminal matters in the State of Oklahoma. The Court of Criminal Appeals held in *State* v. *Koo*, 647 P.2d 889 (Okl.Cr. 1982) that the statute in question, Tit. 21 O.S. §982(A-2) which defines Commercial Gambling as merely "receiving bets" was not so broad in its scope and vague in its application as to be unconstitutional on either federal or state grounds, and held that the statute not only gave fair notice of the activity prohibited, but also contained sufficient guidelines for enforcement.

REASONS FOR GRANTING THE WRIT

The Oklahoma Court of Criminal Appeals, in overruling the lower courts' holding the statute unconstitutional based upon vagueness and overbreadth, expanded the statutory provision even more broadly than the wording of the statute. The Appellate Court's interpretation prohibits merely "receiving a bet" as commercial gambling, thus subjecting potential defendants to ten (10) years imprinsonment and/or a fine of twenty-five thousand ($25,000) dollars. The violation of a state gambling law is the first of three material elements required for federal prosecution of an "illegal gambling business" pursuant to Tit. 18 U.S.C. §1955. The Present Petition for Writ of Certiorari presents a situation where a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court; the state court has decided

a federal question in a way in conflict with applicable decisions of this Court, and the validity of a state statute has been drawn into question on the ground of it being repugnant to the Constitution of the United States.

The respective informations charged each Petitioner with receiving a bet. Oklahoma's commercial gambling statute, Tit. 21 O.S. §982(A-2) sets forth the offense of commercial gambling as:

> "2. receiving, recording or forwarding bets or offers to bet or, with intent to receive, record or forward bets or offers to bet, possessing facilities to do so;"

The above statute, which two district court judges found to be vague in application and overbroad in scope, thus sets forth twelve (12) means to commit commercial gambling:

1. receiving bets;
2. recording bets;
3. forwarding bets;
4. receiving offers to bet;
5. recording offers to bet;
6. forwarding offers to bet;
7. with intent to receive bets, possessing facilities to do so;
8. with intent to record bets, possessing facilities to do so;
9. with intent to forward bets, possessing facilities to do so;
10. with intent to receive offers to bet, possessing facilities to do so;

11. with intent to record offers to bet, possessing facilities to do so, and
12. with intent to forward offers to bet, possessing facilities to do so.

The Magistrate, while struggling with the vagueness and overbreadth of the statute, inquired of the state prosecutor concerning the difference between he and the prosecutor making a five-dollar bet on a football game and the State's allegations of commercial gambling. The prosecutor conceded that he did not think the statute's intent was to cover the individual bet, but rather the intent was directed to the enterprise of commercial gambling. The prosecutor theorized the intent of the commercial gambling statute was directed to stop organized commercial type gambling, and not directed to an individual who made a one-on-one bet, nor was it directed to someone who put in a bet on a football pot or pool (Appendix G).

The Magistrate ruled Tit. 21 O.S. §982(A-2) was too broad, too vague and too indefinite in its terms; that the Legislature did not properly set down the law with specificity to advise reasonable people of what kind of activity it prohibited; that the statute was unclear as to whether a dollar put in a football pot or a bet with a friend on a football game was commercial gambling, and that one could not read the statute and understand what activity he was prohibited from doing (Appendix G). The Magistrate also ruled that Tit. 21 O.S. §981(4), regarding the definition of a gambling place, was unconstitutionally vague and overbroad as was Tit. 21 O.S. §982(A-1) regarding receiving earnings from a gambling place.

The district judge, on the State's appeal from the Magistrate's ruling, concluded the Legislature intended the commercial gambling statutes to combat gambling carried on as a business rather than for amusement. The court issued Orders affirming the Magistrate's decision "since the statute is so broad in it's scope and vague in it's application" (Appendix C and Appendix D).

The Oklahoma Court of Criminal Appeals, rather than interpreting the statute restrictively, reversed the Magistrate's and District Judge's decisions and further held a single bet as charged in the information constituted commercial gambling. The list of alternative methods of violating Tit. 21 O.S. §982(A-2) was thus increased from the statutorily enumerated twelve (12) to twenty-four (24) by judicial construction.

Under this statute as interpreted by the Oklahoma Court of Criminal Appeals, the overbreadth and vagueness become even more apparent. Suppose two office workers, A and B, make a friendly bet of one cent (1¢) on the outcome of their local highschool football game. A states to B, "I'll bet you a penny A highschool football team wins the game tonight." B states to A, "I'll bet you a penny B highschool football team wins the game tonight." A and B each accept the bet.

A, at a minimum, is committing the crimes of "receiving a bet" from B; "forwarding an offer to bet" to B; "receiving an offer to bet" from B; and "forwarding a bet" to B. B is also committing the identical offenses. If A and B made a mental, written or taped notation of their bet then each was "recording a bet" and "recording an offer to bet".

A and B, under the above examples, are guilty of commercial gambling and subject to ten (10) years imprisonment and/or a twenty-five thousand ($25,000) dollar fine.

Petitioners submit that A or B reading the Oklahoma commercial gambling statute would not realize their conduct came within the proscription. It takes but a slight modification of the example of A and B's conversation to reveal the complete overbreadth and lack of explicit standards of the statute.

Three Oklahoma courts have had the opportunity to examine, study and rule upon the constitutionality of Oklahoma's commercial gambling statute, with only one of the three holding that a reasonable man could forsee the application and scope of the statute.

This Court stated in *Connolly* v. *General Construction Company*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 323 (1926), the requisite specificity for notice to avoid vagueness, stating at 269 U.S. 391:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to it's penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at it's meaning and differ as to it's application violates the first essential of due process of law." See also *Lanzettz* v. *New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939).

One of this Court's earlier cases which aptly sets forth the doctrines of strict statutory construction, vagueness and overbreadth and which is followed by present courts in their current decisions is *United States* v. *Reese*, 92 U.S. 214, 2 Otto 214, 23 L.Ed. 563 (1875), wherein the Court stated in sustaining the demurrers to the indictment at 23 L.Ed. 565-566:

> ". . . Penal statutes ought not to be expressed in language so uncertain. If the Legislature undertakes to determine by statute a new offense, it should express its will in language that need not deceive the common mind. Every man should be liable to know with certainty when he is committing a crime.
>
> * * *
>
> ". . . The question then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.
>
> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the Courts to step inside and say who could be rightfully detained and who should be set at large. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Papachristou v. *City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), held there are essentially two independent reasons for the requirement of specificity in penal statutes; due process requires a person of ordinary intelligence be given fair notice that his contemplated conduct is forbidden and explicit standards are necessary in order to prevent arbitrary arrests and convictions resting solely on the unfettered discretion of the police, judges and juries.

Petitioners submit the possibility of a limiting construction is more remote here than in this Court's case of *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). The statute in question by its plain terms is not easily susceptible of a narrowing construction. In fact, the Oklahoma Court of Criminal Appeals when presented with this overbreadth challenge made no effort to restrict its application as was done in *Cox* v. *New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) and *Champlinsky* v. *New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), but instead interpreted the statute even more broadly.

The specific statute in Petitioners' case is aimed at providing a way to identify and prosecute those individuals who are involved in the enterprise of commercial gambling —yet the statute is in no manner so limited. Petitioners submit the analogy is similar to this Court's holding in *Talley* v. *California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), which held invalid an ordinance prohibiting the distribution of handbills because the breadth of it's application went far beyond what was necessary to achieve a legitimate government purpose. In *Talley*, supra, the Court noted that it had been

> ". . . urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited * * * therefore we do not pass on the validity of an ordinance to prevent this or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires." (362 U.S. at 64.)

Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. *Rewis* v. *United States*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971).

Rewis, supra, held the petitioners, who ran a numbers operation near the state line but did not cross the state line, could not be convicted of a violation of the Travel Act merely because out-of-state bettors frequented their operation. The legislative history revealed Tit. 18 U.S.C. §1952 was aimed at organized crime; however, Congress did not proscribe this activity by customers.

The Oklahoma Legislature does not have a daily record of speeches and debates to aid in determing legislative intent. We are thus " 'relegated . . . to the words of the ordinance itself,' to the interpretations the court below has given to analagous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." *Grayned* v. *City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The words of the statute and, in fact, the title itself go to commercial gambling, even if the Oklahoma Appellate Court's interpretation does not. The prosecutor charged with enforcing the statute does not think it applicable to an individual bet, but rather that it is applicable to the business of organized commercial gambling.

A comparison with the federal counterpart, 18 U.S.C. §1955 reveals the lack of standards in the Oklahoma statute. The federal statute defines a "gambling business" in pertinent part, as one which:

> "[iii] has been or remains in substantially continuous operation for a period in excess of thirty days or has

a gross revenue of two thousand dollars in any single day."

The federal statute thus excludes a one-on-one bet between individuals, and sets the requisite explicit guidelines for a commercial gambling business.

Petitioners respectfully submit Oklahoma's commercial gambling statute is so overbroad in scope and vague in it's application as to be unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the reasons hereabove set forth, the Petition should be granted and a Writ of Certiorari should issue to the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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September, 1982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ___ day of September, 1982, three (3) true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed with first class postage thereon prepaid, return receipt requested, to Jan Eric Cartwright, Attorney General of the State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, 73105.

The above listed parties are all of the parties required to be served.

MAC OYLER